



CLOSED CASE SUMMARY

ISSUED DATE: OCTOBER 8, 2019

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2018OPA-1120

Allegations of Misconduct & Director's Findings

Named Employee #1

Allegation(s):		Director's Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force	Sustained
# 3	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Sustained

Imposed Discipline

One Day Suspension

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The Complainants alleged that the Named Employee and another officer may have subjected the Subject to excessive force. OPA further alleged that the Named Employee may have failed to de-escalate and may have engaged in unprofessional conduct.

ADMINISTRATIVE NOTE:

Along with the allegations against Named Employee #1 (NE#1), this case initially included an allegation of excessive force against another officer. Specifically, it was alleged that this other officer used a chokehold on the Subject. That officer was injured as a result of this incident and remains out on medical leave. As such, OPA has been unable to interview him. Based on this officer's unavailability, OPA sought from the Guild and obtained two extensions of time to the 180-day deadline for this case (60 and 90 days). However, given that the officer is still out with no projected date of return, OPA deemed it to be unfair to NE#1 and the Complainants to continue to seek extensions of time. Instead, OPA, with the agreement of the Guild, decided to move forward with its findings on the allegations against NE#1. With regard to the excessive force allegation against the other officer and again with the agreement of the Guild, OPA tolled the 180-day deadline for that allegation until the other officer returns to duty. The Guild confirmed that they would not later raise an argument that OPA violated the 180-day timeline due to the issuance of findings for the other officer after those issued herein for NE#1.



SUMMARY OF INVESTIGATION:

Officers, including NE#1, responded to a potential domestic violence incident. The Subject's brother (who, along with another brother, are the Complainants in this case) called and stated that the Subject was drunk and would not leave their residence. The officers' arrival on the scene and the law enforcement action they took were captured on Body Worn Video (BWV).

The BWV indicated that NE#1 approached the residence and that the Subject was at the front door. NE#1 tried to make verbal contact with the Subject ("hey, hey...what's going on") and the Subject stepped back from the front door of the residence, raised both his arms and hands in the air while facing NE#1, and began walking down the street. The Subject stated "no, bro." NE#1 again tried to make verbal contact with the Subject ("come here, I want to talk to you") but the Subject continued to walk away. NE#1 approached the Subject and shined his flashlight to illuminate the Subject's face and body. The Subject said: "take that flashlight off of me." NE#1 approached the Subject and stated: "Dude, do you want to really do that right now? Do you think you're that tough? Do you?" The Subject turned around and again started walking away. NE#1 said: "You better calm down right now, don't you take that attitude with us." At that point, another officer also arrived at the scene and was standing in the vicinity of NE#1 and the Subject. As the Subject walked away, NE#1 pointed at him and said: "You will lose, you will lose." The Subject turned around and retorted: "I bet I won't." When the Subject did so, he made his hand in the form of a gun and pointed it towards the officers.

NE#1 began to run after the Subject, stating: "Come here then, come here then. Come here then. Come here, you want to find out if you're going to lose?" The other officer also told the Subject that he could not make a threat like that and walk away. NE#1 and the other officer followed the Subject around the side of a house. The Subject turned to face the officers with his hands up. NE#1 pushed him back against a wall and stated: "Huh? Huh? You said...Who's going to lose? Who's going to lose?" The Subject, who was clearly inebriated at the time from the slurring of his voice, stated: "I'm gonna lose. I'm gonna lose. Bro, please." The officers took hold of the Subject's arms and NE#1 started to say: "Grab me one more time you will..." The officers told the Subject that he was detained for making a threatening gesture towards them and he was informed that he was being brought to NE#1's patrol vehicle. The other officer told the Subject to put his hands behind his back and both officers instructed the Subject to "stop." A third officer arrived on scene and the officers told the Subject, who was leaned over and was moving his body away, to "relax." The Subject repeatedly asked what he did, said "no," and pulled towards the ground. Other community members, including the Subject's brothers and a woman who was videotaping the incident, began to gather in the near vicinity. One of the brothers approached the Subject and tried to calm him down. The officers asked that brother to stand back.

NE#1 and the other officer moved the Subject away from the other community members and the other officer indicated that the Subject should be taken down to the ground. The Named Employees pulled the Subject down to the ground. During this time, the other officer continued to tell the Subject to "stop" and that he was being detained, as well as that he was going to be put into handcuffs. NE#1 directed the Subject to put his hands behind his back. At this time, the Subject was lying on his right side. The other officer had the Subject's left arm, but his right arm was underneath his body. The other officer calmly told the Subject that he needed to "stop." The Subject repeated several times: "For what?" The Subject then kicked his leg out at the other officer and the other officer stated: "He just kicked me." The other officer announced that he was going to use a "cross-face" – a trained Department tactic for use with turtled subjects where the officer places the forearm bone against a subject's face and applies pressure to gain compliance – and began doing so. A number of bystanders began yelling "let him go"



and said that the other officer was choking the Subject. The officers were able to get the Subject's other hand behind his back and handcuffed him. The Subject began yelling that he could not breathe. Together, the officers rolled the Subject onto his side and into the recovery position. They then sat him up. The Subject repeatedly yelled at the officers. The officers eventually picked him up and walked him to the patrol vehicle. He was seated inside and transported from the scene. No further force was used.

The officers later screened the arrest and the force used with their supervisor. The other officer stated that they took the Subject down to the ground and they tried to get control of his hands. The other officer stated that the Subject kned him in the head. The other officer told his supervisor that, after this, he made the decision to use a cross-face and that this tactic was successful. Lastly, the other officer recounted that the Subject calmed down but then became more agitated when he was walked to the patrol vehicle.

The force was reviewed by the chain of command. Force Investigation Team (FIT) investigators assisted in this investigation by interviewing the Complainants. The first brother recounted that an officer was on top of the Subject with a knee on the Subject's back and his forearm by the Subject's head. He stated that one other officer was around the Subject's feet. The first brother described that, during this time, the Subject kept saying that he could not breathe. The second brother also heard people telling the officers not to choke the Subject. The second brother recalled that an officer had his forearm across the Subject's neck. The second brother showed the FIT investigator using his own hand that the side of the officer's wrist was against the side of the Subject's neck. The second brother stated that the Subject was speaking during this time (saying that he could not breathe) but there was no time that the Subject could not speak or went unconscious.

The Complainants' allegation that the Subject was subjected to excessive force was referred to OPA. As part of its investigation, OPA reviewed the interviews conducted by FIT. OPA further reviewed the documentation generated by Patrol concerning the underlying incident, as well as the BWV that captured the initial contact with the Subject and the force used by the officers. Based on the chain of command review and its own analysis of the BWV, OPA believed that NE#1 may have failed to de-escalate and may have engaged in unprofessional behavior. Lastly, OPA interviewed NE#1 regarding all of the allegations against him.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

8.200 - Using Force 1. Use of Force: When Authorized

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Whether force is reasonable depends "on the totality of the circumstances" known to the officers at the time of the force and must be balanced against "the rights of the subject, in light of the circumstances surrounding the event." (SPD Policy 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where "no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose." (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

While, as discussed more fully below, I find that NE#1's failure to de-escalate and lack of professionalism made it more likely that force would be needed, I find that the actual force he used was consistent with policy. Immediately prior to the officers making physical contact with the Subject, he made his hand and fingers into the shape of a



handgun and pointed it towards the officers while saying that he would not lose any subsequent physical altercation. The officers stopped him with the intention of investigating this threat, as well as the underlying incident.

Even though the Subject was intoxicated at the time, was walking away from the officers, and appeared to have no actual intent or capability of following through with the threat, the officers were legally permitted to detain him. Moreover, they had an additional lawful basis to detain him to investigate his role in the alleged DV incident. When he would not comply with their directions, they were permitted to use appropriate force to cause him to do so.

Initially, the officers took hold of the Subject's arms and attempted to control his body. He moved around and prevented them from doing so. When the Subject continued to struggle against the officers, they made the decision to take him to the ground. The takedown was controlled, and the Subject did not appear to be injured or complain of injury at that time. While on the ground, the Subject prevented the officers from accessing his right arm, which was underneath his body. The Subject then struck the other officer with his leg. Whether this was intentional or not, it elevated the threat towards the officers and constituted an assault on the other officer. As such, the officers were allowed to use a higher level of force. The other officer chose to apply a cross-face, which is a technique trained for exactly this type of situation. Notably, the cross-face can appear, for someone unfamiliar with the tactic, to resemble a choke hold. As such, the Complainants and others could have legitimately perceived that the Subject was being choked, even if this was not actually the case. During the entirety of the cross-face, the Subject continued to speak – which is inconsistent with his breathing being impaired – and there was no indication that any medical professionalism identify any physical evidence suggesting that the Subject had been choked (for example, redness to the throat/neck or petechial hemorrhaging). NE#1 continued to control the Subject's body and continued to try to extricate his arm from under his body. NE#1 was able to do so and the officers placed the Subject into handcuffs. No further force was used by either officer and the Subject was put into the recovery position.

Ultimately, the force used by NE#1 – a controlled takedown, control holds, and the handcuffing of the Subject – were reasonable, necessary, and proportional under the circumstances of this case. Accordingly, I find that this force was consistent with policy and I recommend that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #2

8.100 - De-Escalation 1. When Safe under the Totality of the Circumstances and Time and Circumstances Permit, Officers Shall Use De-Escalation Tactics in Order to Reduce the Need for Force

"De-escalation tactics and techniques are actions used by officers, when safe and without compromising law enforcement priorities, that seek to minimize the likelihood of the need to use force during an incident and increase the likelihood of voluntary compliance." (SPD Policy 8.100-POL-1.)

The policy further instructs that: "When safe and feasible under the totality of circumstances, officers shall attempt to slow down or stabilize the situation so that more time, options and resources are available for incident resolution." (*Id.*) Officers are also required, "when time and circumstances permit," to "consider whether a subject's lack of compliance is a deliberate attempt to resist or an inability to comply based on factors" such as "mental impairment...drug interaction...[and/or] behavioral crisis." (*Id.*) These mental and behavioral factors should be balanced by the officer against the facts of the incident "when deciding which tactical options are the most appropriate to bring the situation to a safe resolution." (*Id.*)



The policy gives several examples of de-escalation, which include: mitigating the immediacy of the threat to give officers time to use extra resources and to call more officers or specialty units; and increasing the number of officers on scene to thus increase the ability to use less force. (*Id.*) Other examples of de-escalation include, but are not limited to:

- Placing barriers between an uncooperative subject and officers;
- Containing the threat;
- Decreasing exposure to the potential threat by using distance, cover and concealment;
- Avoidance of physical confrontation unless immediately necessary to protect someone or stop dangerous behavior;
- Using verbal techniques, such as “Listen and Explain with Equity and Dignity” (LEED) to calm an agitated subject and promote rational decision making;
- Calling extra resources, including CIT officers and officers equipped with less-lethal tools; and
- Using “any other tactics and approaches that attempt to achieve law enforcement objectives by gaining the compliance of the subject.

(*Id.*) De-escalation is inarguably a crucial component of the Department’s obligations under the Consent Decree; however, it is not purposed to act as an absolute bar to enforcing the law when necessary. That being said, where officers fail to fully de-escalate and instead act in a manner that increases the need for force and the level of force used, such conduct is inconsistent with the Department’s policy and expectations.

From the inception of his contact with the Subject, NE#1 failed to comply with the Department’s de-escalation policy. For example, when the Subject asked NE#1 to stop pointing the flashlight at him, NE#1’s response was: “Dude, do you want to really do that right now? Do you think you’re that tough? Do you?” It’s unclear what the purpose of this statement was. The Subject made no threat towards NE#1 at that time and only asked that the light, which was shining in his face, not be directed at him. As another example, when the Subject began walking away, NE#1 said: “You better calm down right now, don’t you take that attitude with us” and “you will lose, you will lose.” Again, these statements served no purpose except to escalate the situation. The latter statement was particularly adversarial and suggested an imminent physical conflict that the Subject would “lose.” Notably, this was the first time an altercation was suggested. Moreover, this statement prompted the Subject to turn around and make the motion with his hand and fingers that was perceived by the officers to be a threat. Based on OPA’s investigation, but for NE#1’s escalating statements, it is unlikely that this threat ever would have occurred. NE#1 continued to make statements that suggested an imminent physical conflict, including: “Come here, you want to find out if you’re going to lose” and “who’s going to lose.”

NE#1 told OPA that, at the inception of the contact, the Subject’s behavior was already aggressive. He explained that his intent in speaking to the Subject in the manner that he did was to get the Subject to calm down. NE#1 stated that he raised the fact that the Subject would “lose” any fight to avoid an actual physical altercation. Lastly, NE#1 explained that he yelled at the Subject as a tactic to calm the Subject down.

Based on OPA’s review of the video, NE#1 did not, at any point during this incident, apply the LEED model. He did not appear to ever consider the fact that the Subject was intoxicated – which was set forth in the CAD call notes – and evaluate whether that played a factor in his lack of compliance. Moreover, instead of trying to avoid conflict, as contemplated by Department policy and training on de-escalation, NE#1 instead used words and actions that prompted it. Further, NE#1’s recounting of how his statements constituted de-escalation or were tactically advisable



is simply not supported by the video evidence and is inconsistent with the Department's clear expectations of his conduct in such situations. For these reasons, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**

Named Employee #1 - Allegation #3

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees "strive to be professional at all times." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." (SPD Policy 5.001-POL-10.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person." (*Id.*) Lastly, the policy instructs Department employees to "avoid unnecessary escalation of events even if those events do not end in reportable uses of force." (*Id.*)

I find that NE#1 violated the Department's professionalism policy when he unnecessarily escalated this incident through his acts and statements. This type of conduct, particularly when it results in force being used, undermines public trust and confidence in officers and the Department. As such, I recommend that this allegation be Sustained.

Recommended Finding: **Sustained**